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THE AMERICAN DOCTRINE OF EQUITABLE MORTGAGES BY DEPOSIT OF TITLE DEEDS

I.

The English doctrine that an equitable mortgage may be created by depositing the title deed to land with a creditor has been recognized, either by decision or by *dictum*, in this country, to some extent. In the earlier cases in New York¹ and South Carolina,² states which had a separate chancery jurisdiction and which early adopted the doctrines of the English court of chancery, the English doctrine apparently was adopted at first; but in the later case of *Parker v. Bank*³ there is no doubt as to the position of South Carolina in respect to the doctrine. It was held that "a mere parol deposit of title deeds as a security for debt" does not create an equitable mortgage on land as it would be incompatible with the registry laws. In *Sleeth v. Sampson*⁴ Judge Cardozo indicates that the status of the doctrine in New York is quite uncertain. He says: "To what extent, if at all, this form of equitable mortgage is permitted in New York, is involved in some obscurity."

However in *Ebling Brewing Co. v. Geunario*⁵ Blackmar, J., speaking for the Appellate Division of the New York Supreme Court, Second Department, had this to say: "The

¹ *Rockwell v. Hobby*, 2 Sandf. Ch. (N. Y.) 9 (1844) (a son had paid his mother's mortgage and retained an unrecorded deed to her as security; held, son had an equitable mortgage on the premises for the amount of his advance with interest).

By way of a criticism of this case, it is said that the case loses force from the further holding that the son was subrogated to the rights of the mortgagee whom he had paid. See: *Bloomfield State Bank v. Miller*, 55 Neb. 243, 251, 75 N. W. 569, 572, 44 L. R. A. 387, 70 A. S. R. 381 (1898).

² *Hutzler Bros. v. Phillips*, 26 S. C. 136 (1886) (deposit of title deeds to enable an attorney to prepare a legal mortgage in accordance with an oral agreement to that effect; held not to create an equitable mortgage. While the Court purported to follow the English authorities, it was not aware of the conflict of those authorities on this point).

³ 53 S. C. 583 at pp. 595, 596 (1898).

⁴ 237 N. Y. 69, 74, 142 N. E. 355, 30 A. L. R. 1400 (1923).

⁵ 189 App. Div. (N. Y.) 782, 785 (1919).

text writers state that the doctrine of equitable mortgage by deposit of title deeds is not usually accepted in the United States. Among the states that reject the doctrine New York is not named, apparently on account of *Rockwell v. Hobby* (2 Sandf. Ch. 10). That case cannot be held to be authority that the doctrine is adopted in this State. The case was considered in *Bowers v. Johnson* (49 N. Y. 432), and, it seems to me, disapproved. In *Stoddard v. Hart* (23 N. Y. 556) Comstock, Ch. J., said: 'In this State the doctrine is almost unknown, because we have no practice of creating liens in this manner.' I think it may be said with accuracy that the doctrine is entirely unknown in this State." Probably such a transaction would be recognized and enforced, in this jurisdiction, in cases where it would be *inequitable* to refuse relief to the depositor, where he has performed.⁶ The New York Statute of Frauds is suggestive. It is therein provided:⁷ "Nothing in this title contained, shall be construed to abridge the powers of courts of equity, to compel specific performance of agreements, in cases of part performance of such agreements." Some latitude is thus left for the exercise of the powers of a court of equity.

In New Jersey the English doctrine appears to have a fairly firm foothold. In *Griffin v. Griffin*⁸ the complainant sued to compel the defendant to surrender to her deeds to complainant's ancestor of land in New York. The deeds had been deposited as security. The Court, relying on New York authorities as governing and as indicating that such a deposit operated in that State as a mortgage, refused to decree their surrender until the complainant offered to do equity by paying the debt for which the deeds were pledged. In *Gale's Executors v. Morris*⁹ the Court said that an equitable mortgage may be "created by a deposit of title-deeds," citing *Griffin v. Griffin*, and *Brewer v.*

⁶ See suggestion in *Stoddard v. Hart*, 23 N. Y. 556, 561 (1861).

⁷ 3 N. Y. Rev. St. (1875) c. 7, tit. 1, § 10.

⁸ 18 N. J. Eq. 104 (1866).

⁹ 29 N. J. Eq. 222 (1878).

*Marshall*¹⁰ (a case where the doctrine was not involved). In the more recent case of *Bullowa v. Orgo*¹¹ a different matter is involved. It was there held that the deposit of title deeds in pledge for the payment of a debt until a legal mortgage should be executed, under an oral agreement, constituted an equitable mortgage; the Court relied chiefly on English authorities.

In Alabama,¹² Mississippi,¹³ Missouri,¹⁴ and Tennessee,¹⁵ the English doctrine has been rejected as being contrary to the Statute of Frauds in each of these states. In Iowa,¹⁶ Ohio,¹⁷ South Carolina,¹⁸ and Vermont,¹⁹ the doctrine is rejected as being incompatible with the recording or registry laws. In the Federal District Court for the District of Oregon,²⁰ Kentucky,²¹ Minnesota,²² Nebraska,²³ and Pennsylvania,²⁴ the doctrine is rejected for both reasons.

¹⁰ 19 N. J. Eq. 537 (1868).

¹¹ 57 N. J. Eq. 428 (1898).

¹² *Lehmann, Durr & Co. v. Collins*, 69 Ala. 127 (1881), *dictum*, that the doctrine is contrary to the Statute of Frauds.

¹³ *Gothard v. Flynn*, 25 Miss. 58 (1852), held, that deposit of deed with surety, accompanied by an oral agreement that he have a lien on the land, did not create an equitable mortgage, as the requirements of the Statute of Frauds were not met. See, also: *Williams v. Stratton*, 10 S. & M. (Miss.) 418 (1848), where it was said that, "Such a mortgage is in direct opposition to the Statute of Frauds..."

¹⁴ *Hackett v. Watts*, 138 Mo. 502, 515 (1897), *dictum*, "The owner of the fee can not create a lien upon the land by simply depositing his deed as security for money borrowed because such a contract would come within the provisions of the Statute of Frauds. . . ."

¹⁵ *Meador v. Meador*, 3 Heisk. 562 (1871), *dictum*, that the doctrine does not prevail in Tennessee, as it would be contrary to the Statute of Frauds. But it appears from the Court's reasoning that there was only an intent to give a lien on the deed deposited

¹⁶ *In re Snyder*, 138 Iowa 553, 114 N. W. 615, 19 L. R. A. (N. S.) 206 (1908).

¹⁷ *Probasco v. Brooks Johnson*, 2 Disn. (Ohio) 96 (1858) (deposit of title deed to certain land "sought to be subjected," accompanied by an oral agreement "that it was thereby intended a lien should be created," held not an equitable mortgage, as it would be contrary to the spirit of the registry act.

¹⁸ *Parker v. Bank*, 53 S. C. 583, 595, 596 (1898), held, that "a mere parol deposit of title deeds as a security for debt" does not create an equitable mortgage as it would be contrary to the registry laws.

¹⁹ *Bicknell v. Bicknell*, 31 Vt. 498 (1859), *dictum*, that the doctrine has no place under our registry system.

²⁰ *Grames v. Consolidated Timber Co.*, 215 Fed. 785 (1914), deposit of final homestead certificate as security for past and present advances; held, not an equitable mortgage on the homestead, as it would be contrary to the registry system and the Statute of Frauds.

Two reasons would seem to have impelled an adoption of the English doctrine in this country. The English Statute of Frauds and Perjuries of 1677 is the prototype of many an American Statute of Frauds; and many states have statutes providing for the adoption of the English common law in so far as it is applicable and not inconsistent with the Constitution of the United States or the organic law of the respective states. But the American courts have profited by the conscious realization by Lord Eldon and other English judges that the English doctrine is not only the plainest violation of the purpose and policy of the Statute of Frauds, but also is pernicious. In commenting on the rule *stare decisis et non quieta movere*, in this connection, the Supreme Court of Minnesota said ²⁵ that while it regarded this rule as of quite as much importance as any in the administration of justice, it thought that “. . . whenever a question is presented for the first time, and we become satisfied that the courts of England, or in any of the States, have adhered to a rule which they confess to be erroneous, simply because they are bound by precedents of their own making, it is our duty, as well as our privilege, without violating any rule of decision, to adopt the view most consonant with reason and principle. . . .”

On the other hand, the High Court of Errors and Appeals of Mississippi was not willing to go upon authority and discussed the doctrine from the standpoint of principle. It said that the mere act of deposit of the deeds did not satisfy

²¹ *Vaumeter v. McFaddin*, 8 B. Mon. (Ky.) 435 (1848), *dictum*, that the adoption of the English doctrine would be contrary to the Statute of Frauds and the recording acts.

²² *Gardner v. McClure*, 6 Minn. 250 (1861), *dictum*, that the English doctrine is contrary to the Statute of Frauds and the registry system.

²³ *Bloomfield State Bank v. Miller*, 55 Neb. 243 (1898), held that the English doctrine is contrary to the Statute of Frauds and the registry system.

This decision contains a discussion of the earlier Federal case of *First Nat. Bank v. Caldwell*, Fed. Cas. No. 4,798 (Cir. Ct., D. Neb., 1876).

²⁴ *Shitz v. Dieffenbach*, 3 Pa. St. 233 (1846) (Deposit of unrecorded deed with surety as a security; held, not to create an equitable mortgage as it would be contrary to the Statute of Frauds and registry acts.)

²⁵ *In re Gardner v. McClure*, 6 Minn. 250, 263 (1861).

the evidential requirements of the Statute of Frauds; it was not an unequivocal act, sufficiently noteworthy to take the case out of the operation of the statute.²⁶

The strongest reason against the adoption of the English doctrine in this country is the registry system. The purpose of this system is to afford security to titles by a public record which parties dealing with the land may, and for their own protection must, examine, and on which they may rely. Secret transfers and liens are sought thereby to be prevented. A mortgage by deposit of title deeds tends to defeat this purpose. The recording acts have another bearing on the question. In England title deeds followed the land. The evidence of title lay not only in the delivery of a deed, but in its continued possession by the grantee. When, therefore, the owner parted with his muniments of title he parted with the means of disposing of the land. When the deposit was by way of pledge, the pledgee, by his manual possession of the deeds, had the effective power to prevent an untoward disposition of the land. But under our system it is not usual to consult or even to inquire about the original conveyances. They have performed their chief offices when they have been recorded. Thenceforth the record becomes the practical evidence of title.

While the doctrine of equitable mortgage by the deposit of title deeds has been discussed in this country, as a matter of principle, chiefly with respect to a local Statute of Frauds and recording or registry act, there has been some discussion of the doctrine in reference to a deposit as security for antecedent indebtedness. In *Sleeth v. Sampson* Judge Cardozo said:²⁷ "The danger [involved in the doctrine] is emphasized in this case where the bulk of the indebtedness was antecedent to the promise." In *Hutzler Bros. v. Phillips*²⁸ it was said: "It appears . . . that in England, and also in several of

²⁶ *Gothard v. Flynn*, 25 Miss. 58 (1852).

²⁷ 237 N. Y. 69, 74, 142 N. E. 355, 30 A. L. R. 1400 (1923).

²⁸ 26 S. C. 136, 147 (1886).

the States, that where the title deeds are actually deposited by the debtor with his creditor upon an advance of money, and perhaps even for an antecedent debt, as a security, that an equitable mortgage will arise without more. . . ."

A more positive assertion appears in *Probasco v. Johnson*²⁹ that "In England, however, and in New York, as well as in Mississippi, where the equitable right is said to be thus created, it exists only when an advance is made, upon the faith of the deposit, never to secure a precedent debt, or to create a trust by which a lien would enure to prior creditors."

In the English case of *Mountford v. Scott*³⁰ Lord Eldon held that the deposit would not, by implication, include antecedent debts. It would seem to require a clear intention to that effect to be manifested before even the English courts would recognize that the deposit secured previous advances. The tenor of the cases is to this effect.³¹

II.

The doctrine of equitable mortgage by deposit of title deeds is said to be hostile to the recording acts in this country. In a sense, this is true. Under our recording or registry laws, the mere possession of the title deeds is of no real significance, necessarily, to the owner of the real estate; the records of recorded deeds or certified copies thereof may take their place. The "practice is to record instruments affecting real estate, and the law, generally, provides for making such records, and certified copies thereof, evidence."³² "Owners look to the record as furnishing the real evidence of title, and as exhibiting the true condition of all interests in and claims upon the land which could affect the right of purchasers or incumbrancers; and to the records all parties go, as a matter of course, even in preference to the original

²⁹ 2 Disn. (Ohio) 96, 100 (1858).

³⁰ 37 Eng. Rep. 1105 (1823).

³¹ 2 Powell on Mortgages, 6th ed., 1057a.

³² *Jennings v. Augir*, 215 Fed. 658, 660 (1914).

deeds. In fact, no presumption or inference would, in general, be raised from the mere possession of title deeds by a stranger.”³³

But in another sense, we might inquire as to whether such a mortgage is necessarily repugnant to our registry laws. Is there any reason why actual notice of an equitable mortgage arising upon a mere deposit of title deeds should not be the equivalent of actual notice of a prior unrecorded mortgage? One object of the registry laws is to give notice of the state of the title to subsequent purchasers or incumbrancers. From this viewpoint, these acts would be violated when the enforcement of the equitable mortgage by deposit would result in subordination of a person who had relied on the record title without actual notice of the equitable mortgage. But when the true state of the title is actually made known to the subsequent purchaser or incumbrancer regardless of any record being made, wherein would the registry laws be violated, either the spirit or letter, by subordinating him to such a prior equitable mortgage? The more persuasive cases in this connection are those in which there has been a deposit of a title deed with the creditor, accompanied by an oral agreement that the deed is delivered to the latter as *a mortgage upon the depositor's interest in the land to secure a debt or obligation*. The authorities are apparently divided on the question as to whether the depositor secures an equitable mortgage thereby. In *Jennings v. Augir*³⁴ *E* gave *R* a deed to an undivided moiety of certain lands, which deed *R* did not record. *R* delivered this deed to *E*, taking back from *E* a written memorandum, signed by *E* and stating that the deed was delivered as a mortgage or lien upon *R*'s interest in the land to secure certain indebtedness. In an action by the trustee in bankruptcy of *R*, brought against *E* to recover an undivided half interest in the lands, the Court held that the transaction con-

³³ 3 Pomeroy, Equity Jurisprudence (3d ed.) § 1265.

³⁴ *Jennings v. Augir*, 215 Fed. 658, 660 (1914).

stituted a valid equitable mortgage. After discussing the basis of the English doctrine, the Court said: "As long as the deed is unrecorded, and, without fraud on the part of the grantor, returned by him to the grantee — thus putting it in his power to destroy the same, and thereby greatly jeopardizing any evidence of rights thereunder, if not rendering it impossible for the grantee to establish his title — while the rule requiring the best evidence obtains, it appears clear that the reasoning upon which the English cases have been decided would apply and control." The Statute of Frauds was not pleaded against the mortgage, and so the Court discussed the situation with respect to the registry laws. The result reached seems to be sound. *E* would seem to have an effective power to prevent an untoward disposition of the land, such as would defraud him, just as he would have had under the English system. This would be true whether the grantee in the unrecorded deed delivered it to the grantor as security or delivered it to another creditor as security.

In *Gardner v. McClure*³⁵ *R* delivered an unrecorded deed of certain premises to *E* as security for a debt, giving *E*, at the same time, a memorandum (unsigned) stating that *E* was to *hold the deed* as security. Subsequently, *R* gave *E-2* a mortgage on the premises; *E-2* had notice of *E*'s claim before the former obtained his mortgage. On demurrer to the complaint of *E* setting forth the foregoing facts and asking *inter alia*, that the mortgage of *E-2* be declared a subsequent lien to that of *E* and asking for a decree of foreclosure and sale of the premises, it was held that the deposit of the deed and the accompanying writing did not create any interest in the land in the favor of the deposittee, the writing not being sufficient to take the case out of the operation of the Statute of Frauds, and the doctrine of equitable mortgages by deposit of title deeds being considered as contrary to the policy of the registry laws. The Court purported to condemn the doctrine *absolutely* as being an "an-

³⁵ 6 Minn. 250 (1861).

tiquated heresy," and as being contrary to sound commercial principles. But the facts of the case hardly justified such a far-reaching effort on the part of Justice Flandrau, who delivered the opinion. There was no intention to create an interest or estate in the lands; *R* only intended to give a *lien upon the deed* itself, and the Court might well have stopped here. Even the English authorities would not have held that *E* obtained an equitable mortgage on the land, *contrary to the intent* of the parties. Therefore, it was a sound conclusion that *E* obtained no security interest in the land itself; his only security was a lien on the deed. If *E-2* had had no actual notice of *E's* claim, the fact that there were no deeds in the possession of *R* or on record might be held sufficient notice to put *E-2* on inquiry. Few purchasers would take title under such circumstances.

There is something to be said in favor of a policy that is opposed to any laxity in recording instruments that affect the title to real estate, since there are those other than purchasers or incumbrancers who probably rely on record titles as a basis for granting credit. It would certainly have some bearing on the financial rating of the record owner of property. The policy of the registry law promotes certainty and tends to prevent the efforts to encumber land with secret liens. There is little, if any, occasion for such lax methods of doing business to-day. It can hardly be said that business men, or the practice of making loans generally, would sanction the doctrine of equitable mortgage by deposit of title deeds.

III.

In the great majority of the cases in this country that have considered the doctrine of equitable mortgage by deposit of title deeds, there has been involved only the question of whether the deposit gave rise to an equitable mortgage on the real estate comprised within the deeds. Many cases involve an oral agreement, accompanying the deposit,

that the depositor either have a *lien on the documents or on the land* comprised within them. Where, however, the deposit is accompanied by an oral agreement *to execute a legal mortgage*, there are two possible situations: (a) The deposit may be by way of a present security until the legal mortgage is executed; or (b) it may be merely a preliminary step to the preparation of a mortgage which will be security thereafter. In regard to these two situations, the depositor may present his claim for relief on one or the other of three possible theories: (a) He may simply claim that the deposit constitutes an equitable mortgage. If so, one court, at least, has asserted that the deposit must have been made for the purpose of creating a *present or immediate security* in order to entitle depositor to the benefit of an equitable mortgage.³⁶ Or (b) he may claim that there has been a sufficient part performance, with attending circumstances, to make a case of fraud, against which a court of equity ought to relieve. Or (c) he may base his claim to relief simply on the ground of part performance. If the plaintiff bases his claim to relief on the ground of part performance, then he must rely on acts which frequently are, and must be, equivocal, and he will generally be denied relief, if the Statute of Frauds is relied on as a defense.³⁷ Such a lien may be said to arise by operation of law, the creation of which the Statute of Frauds does not prohibit.³⁸

From the standpoint of authority, some of the leading cases will be considered. In *Foster Lumber Co. v. Harlan County Bank*³⁹ one Underwood held a contract of purchase from the L. Company of certain real estate upon which there remained a balance due. He obtained a loan of \$900 from the Harlan County Bank for the purpose of paying this balance, and for the purpose of discharging certain ob-

³⁶ Hutzler Bros. v. Phillips, 26 S. C. 136 (1886).

³⁷ See: Williston on Contracts, § 494.

³⁸ Foster Lumber Co. v. Harlan County Bank, 71 Kan. 158, 161, 162, 80 Pac. 49, 114 A. S. R. 470, 6 A. C. 44 (1905).

³⁹ Foster Lumber Co. v. Harlan County Bank, 71 Kan. 158, 161, 162, 80 Pac. 49, 114 A. S. R. 470, 6 A. C. 44 (1905).

ligations he had incurred for improvements on this land. When the loan was made, he left his land contract with the Bank, and authorized it to procure a deed of the property from the L. Company; at the same time, he orally agreed with the Bank that it should hold the land contract, and afterward the deed, as security until a formal written mortgage could be prepared, which he agreed to give. The Bank paid the L. Company, obtained the deed, and paid the obligations for improvements. Underwood then refused to execute the formal mortgage to the Bank, and mortgaged the property to the Foster Lumber Company, which Company had actual notice of the equities of the Bank. The Bank sued to recover the balance due upon its loan and claimed a lien on the land superior to that of the Lumber Company. In sustaining the Bank's claim that it had a lien on the land and that this lien had priority over the mortgage of the Lumber Company, the Supreme Court of Kansas said:

"The bank . . . pleaded and proved . . . that the deposit of the contract of sale was accompanied by an express oral agreement to give a mortgage. The agreement furnished a sufficient basis upon which, after performance by the bank, to found a lien, and is sufficient to take the case entirely out of the category of equitable mortgages arising from a deposit of title deeds . . . The fact that the transaction may have included an attempt to create a lien by the deposit of title instruments does not alter or destroy the effect of the promise to give a mortgage. The bank's theory, in part, may have been that the deposit of the contract and the procuring of the deed . . . did give it a lien. The two claims are not inconsistent. Both have been urged . . . Having obtained the bank's money upon an agreement to give it a mortgage, Underwood should have executed and delivered the promised security. Equity treats that as done which a party under his agreement ought to have done . . . The fact that the agreement to give a mortgage was oral does not affect the

validity of the bank's lien. It had fully performed its part of the agreement . . . 'courts of equity . . . decree the specific execution of agreements where there has been a performance on the one side, because the refusal to perform on the other side is a fraud; and they will not permit the statute designed to prevent fraud to be made an engine of fraud.' . . . Besides, it properly may be said that the lien decreed results from the operation of the law upon the entire conduct of the parties, and hence is in its terms excluded from the inhibition of the statute. 'It is claimed by counsel . . . that an equitable lien on real estate . . . cannot be created merely by parol; that the statute of frauds . . . prohibits such a thing. All of this we agree to; but still the statute of frauds does not attempt to prohibit the creation of equitable liens by operation of law, nor does any other statute . . . Such a lien should of course be in accordance with the contract and understanding of the parties affected by it, but still it may sometimes result by operation of law from the transactions of the parties almost wholly independent of the contract that may be made between them.' . . . notice to the lumber company of the bank's rights was equivalent to notice of a prior unrecorded mortgage. Under the recording acts such instruments are valid between the parties and (as to) all persons having actual notice of them."

The court did not consider whether or not the deposit of the land contract with the Bank and the obtaining of the deed by the Bank created an equitable mortgage, and it expressly refused to consider the policy of the State towards such an equitable mortgage. It proceeded rather on the theory that the oral agreement to give a legal mortgage, accompanying the deposit, plus performance by the Bank (complete performance by transferring the \$900), gave the Bank a right to a lien on the land, and the judgment of the trial court *awarding* the Bank a lien on the land was affirmed. This lien, or property right, was held to be superior to that of a subsequent lienor with actual notice thereof.

Since the lien was *awarded* to the Bank, it looks like it took effect by operation of law, whether arising pursuant to the contract or not, and a decree of "specific execution" of the contract would be unnecessary and unimportant.

The theory of the Kansas Court that where there has been a performance of an agreement on the one side, refusal to perform on the other side is a fraud, and that a court of equity will decree specific execution of the agreement in such a case, is very interesting. There was no evidence of actual fraud in the case. Apparently, Underwood intended to perform his promise when he made it. In most cases, where a promise has been made in good faith and is subsequently broken, the refusal to perform does not give rise to a cause of action, either for deceit or for equitable relief,⁴⁰ whether the equitable relief is positive or by way of rescission and restitution.

The Kansas Court merely referred to and relied upon one theory underlying the recording statutes, namely, that recording operates to give constructive notice, and when, as in the case, a subsequent mortgagee or grantee of the premises has actual notice of a prior interest in the premises based upon an unrecorded recordable instrument, the fact that the latter instrument is not recorded is immaterial. Clearly, this brief reference to the recording statute contains nothing that would show that an equitable mortgage by deposit of title instruments would not be recognized and enforced in Kansas. Everything said in the opinion is consistent with recognition of such a mortgage. We are not informed as to why Underwood's refusal to execute a legal mortgage induced the action of the Bank; it had possession of the land contract and subsequently the deed. How Underwood could create any subsequent interest in the premises is not explained by the Court. It seems that the Bank had ample protection in its possession of these instruments.

⁴⁰ Prosser on Torts, 764, 765.

The leading case on the theory of part performance is *Sleeth v. Sampson*,⁴¹ the opinion in which was rendered by the late Justice Cardozo. The action was brought to enforce specific performance of an oral agreement to execute a mortgage upon certain land as security for a loan advanced at the time the oral agreement was made in 1921; that time the debtor handed to the creditor a deed under which the premises had been conveyed to the debtor in 1904 and an abstract of title saying: "You look these over, and see what you can do, and we will go down to the lawyer's in a few days and draw this up." Nothing more was done or said. The debtor died within less than a month thereafter. The judgment of the trial court dismissing the complaint was affirmed by the New York Court of Appeals. Justice Cardozo said:

"An estate or interest in real property (other than a lease for a term not exceeding one year) cannot be created, granted, or assigned 'unless by an act or operation of law, or by a deed or conveyance in writing.' Real Property Law (Consol. Laws, chap. 50), § 242. A contract 'for the sale of any real property, or an interest therein,' is void unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the grantor. Real Property Law, § 259. A mortgage is a conveyance of an interest in real property within the meaning of § 242. A contract to give a mortgage is a contract for the sale of an interest in real property within the meaning of § 259."

Having thus established that the creation of a mortgage of real estate requires a writing, within the meaning of the State statute, and that a contract to give a mortgage of real estate is within the State Statute of Frauds, the Court then proceeded to consider whether there had been acts of part performance sufficient to relieve from the necessity of production of a writing, saying:

⁴¹ 237 N. Y. 69, 142 N. E. 355, 30 A. L. R. 1400 (1923).

"To be thus effective, they (acts of part performance) must be of such a nature as to be 'unintelligible or at least extraordinary,' unless related to a contract to convey an interest in land . . . The payment of money is not enough, unless followed by other acts, as, for example, possession or improvement . . . The deficiency in the acts of part performance is supplied, it is said, by delivery of title deeds and abstract. Equitable mortgages by the deposit of title deeds have long been recognized in England, though the security is frowned upon as contravening the policy of the statute of frauds . . . To what extent, if at all, this form of equitable mortgage is permitted in New York is involved in some obscurity . . . Even in England, however, the deposit must have been made for the purpose of creating a present or immediate security, and not merely as a preliminary step to the preparation of a mortgage which will be security thereafter . . . We find no suggestion here of the existence of a purpose to create a present lien . . . At best, the case is within the rule that acts merely ancillary or preliminary to performance are not acts of part performance within the equitable doctrine."

According to this reasoning, it is difficult to understand just how a mortgagee would ever partly perform so as to relieve from the production of a writing. The New York Civil Practice Act, § 991, expressly denies to the mortgagee the right to maintain an action to recover the mortgaged premises. But the mortgagee may obtain possession by consent of the mortgagor, or by a decree in foreclosure.⁴² Even if the mortgagee obtained possession of the premises with consent of the mortgagor, he would rarely, if ever, be interested in making improvement, at least, to the extent that a vendee would be so interested. The only part performance in New York that would normally be made by a mortgagee would be making a part of the loan or extending

⁴² See: *Barson v. Mulligan*, 191 N. Y. 306, 84 N. E. 75, 16 L. R. A. (N. S.) 151.

a part of the credit promised to the mortgagor. In the principal case the evidence did not show how much of the promised loan was made by the mortgagee; if he advanced all of the loan, there would be complete performance by him. In the second place, the Court seems to indicate that the mortgagee may rely upon the acts of the mortgagor in handing over the deed and abstract as a part performance. Generally, a party relying upon acts of part performance must rely upon his own acts, not those of the other party to the contract.⁴³ The making of the loan, or the advancing of credit, by the mortgagee would hardly be "unintelligible or at least extraordinary," unless related to a contract to mortgage; such acts could refer to an unsecured loan just as readily, using the Court's test of sufficiency of acts of part performance. The Kansas Supreme Court, as we have seen, has adopted the view that the advancement of the loan by the mortgagee is a complete performance of all acts normally expectable on his part.⁴⁴ Professor Walsh says that "the fundamental difficulty with the argument of the Court in *Sleeth v. Sampson* is in the failure to recognize that a purely executory contract to make a loan and give a mortgage will not be specifically enforced in favor of either party as the remedy at law is adequate, while an executory contract to sell land will be so enforced."⁴⁵ With this position, the writer disagrees. A money judgment would hardly be adequate for a creditor who has contracted for a mortgage security, any more so than in case of a purchaser who has paid part of the purchase price but has failed to get a conveyance. While good business practice would frown upon such "looseness" by the creditor, the immediate demands of the debtor might require haste; if so, why should he be permitted to shield himself behind the Statute of Frauds as against an accommodating friend? Any question

⁴³ 58 C. J. p. 993.

⁴⁴ *Foster Lumber Co. v. Harlan County Bank*, 71 Kan. 158, 161, 162, 80 Pac. 49, 114 A. S. R. 470, 6 A. C. 44 (1905).

⁴⁵ Walsh on Mortgages, 48, N. 30.

as to a creditor obtaining a preference or as to perjury could readily be disposed of by any court.

The statement of the facts by the New York Court of Appeals, in *Sleeth v. Sampson*, does not show whether or not the deed that was deposited with the creditor had been recorded prior to the deposit. If it had been thus recorded the record title would have been in the debtor, and the deed itself, for most, if not all, practical purposes, would have been of no value; a certified copy of the record copy would serve as well as the original. On the other hand, if the deed was not recorded at the time of the deposit, the creditor would have been in the same advantageous position as the creditor in the *Foster Lumber Co.* case.

The leading case in this country adopting and applying the doctrine that a mere deposit of title deeds with the creditor to be held as a security for a present loan, or advancement of credit, or to secure the incurring of an obligation (for instance, as surety), is *Bullowa v. Orgo*.⁴⁶ In this case the Bullowa firm had employed Orgo as agent to sell their goods and collect payment therefor. To secure faithful performance of this contract by Orgo, one Bilancia deposited the title of deed for his house with the Bullowa firm to be held as security for any defalcation by Orgo until Bilancia should execute a formal mortgage on the house. Later, Bilancia refused to execute the formal mortgage and demanded a return of the title deed. The Bullowa firm sued for an accounting from Orgo and to have the house declared subject to a lien for the amount found due from Orgo to the firm. The court overruled the demurrers to the bill. The bill was said to be one to foreclose an equitable mortgage. One point raised by the demurrers was that the deposit did not create an equitable mortgage because the debt for which the deed was deposited as security was the debt of a third person and not that of Bilancia. But the Court held that

⁴⁶ 57 N. J. Eq. 428, 41 Atl. 494 (1898).

an equitable mortgage could be created in this manner, saying:

"I am unable to assent to the doctrine that an equitable mortgage, by depositing title deeds, may not be created in order to secure the debt of a third person. The authorities are not so. It was faintly argued by the demurrants that the deposit of title deeds, with an agreement to execute a legal mortgage, did not constitute an equitable mortgage. But the authorities are the other way."

The facts in this case do not show whether or not the deeds had been recorded prior to the deposit. There was a distinct agreement that the deed be held as security until a legal mortgage could be executed on the date agreed upon. The Court made no analysis of the doctrine, and did not consider the objections to its application in this country. The authorities cited are four English cases, an early New York case, and *Jones on Mortgages*. The opinion is not a very important one in favor of approval of the equitable mortgage by deposit of title deeds except for the fact of mere express sanction.

The New York Court of Appeals, in *Sleeth v. Sampson*, said that a contract to give a mortgage on land is within the Statute of Frauds and is void unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the mortgagor. In *In re Snyder*⁴⁷ a deed of Des Moines, Iowa realty was deposited as security for a suretyship undertaking; the deposit was accompanied by an informal writing stating that the "inclosed papers" (the deed and some promissory notes) were deposited as security against any loss by reason of the suretyship obligation, and describing the property as the "Des Moines property, which is pledged" to the surety. In holding that an equitable mortgage on the land was thereby created, the Iowa Court said:

⁴⁷ *In re Snyder*, 138 Iowa 553, 114 N. W. 615, 19 L. R. A. (N. S.) 206 (1908).

"While the instrument is informal its purpose is manifest, and there is no reason for not enforcing the lien intended thereby to be created. No particular formality is necessary to make a valid mortgage between the parties thereto . . . 'If the transaction resolves itself into security, whatever may be its form, it is in equity a mortgage.' "

This statement was not made in discussing the Iowa Statute of Frauds. Whether this writing was a sufficient memorandum under the statute, we are not informed. Neither are we informed as to whether or not this writing was recordable, under the Iowa recording statute. In a prior part of the opinion, the Iowa Court expressly disapproved of the doctrine of equitable mortgages by deposit of title deeds with creditors, as running counter to the State system of registry. If public policy is opposed to the one transaction, under this State's registry system, why is it not equally opposed to the other?

IV.

The conditions which led to the recognition, in England, of the doctrine of equitable mortgage by the deposit of title deeds are entirely wanting in this country. The basis of fact which exists in England is not found in our law or practice. The doctrine is not in harmony with our system of recording and our methods of conveyancing. In several of the states, where the doctrine has been judicially considered, it has been repudiated. A few states purport to recognize the English doctrine; but there is no settled course of judicial decision to this effect and it can hardly be said that the doctrine is firmly established in these states.

Where the deposit of title deeds is by way of a *present* security and is accompanied by a parol agreement to execute a legal mortgage, which agreement is not performed, and the depositee brings an action for specific performance, on the theory that the agreement has been partly performed, or fully performed, by making part or all of the promised loan, the better view would seem to be that the same rule

should apply as applies in case of an action for specific performance of a contract to convey land.

A deposit of a title deed with the creditor as security for an indebtedness, whether accompanied by an express parol agreement, should mean something and create *some right* both at law and in equity. It is a valid pledge of the deeds themselves, valid as *between the parties*, and would give ample security if the deed has not been recorded. It is similar to a solicitor's lien. The depositor cannot recover the deeds at law until he pays the debt; neither can he recover the deeds in equity until he does equity by discharging the obligation which the deeds were intended to secure. But Pomeroy would go one step further, and regard, in equity, the pledge of the deeds as creating a lien on the land. Such a result, he says, would be carrying out the evident intention of the parties, and would be in complete harmony with our system of recording and of conveyancing. On the other hand, as respects third persons, such as purchasers or incumbrancers, even those who deal with the land embraced within the deeds with actual notice of the deposit, such a lien should not be recognized at all.⁴⁸ This distinction goes too far. There is no policy in favor of protecting a subsequent vendee or mortgagee of the premises where he has actual notice of the depositor's asserted interest in the land involved. There is no recording statute in this country that denies effect to all transactions the evidence of which is embodied in nonrecordable instruments. A defensive lien on the deed deposited might not be a sufficient security; the debtor might need prompting. Recognizing a lien on the land would overcome this objection to limiting the depositor's rights to a defensive lien. There seems to be one objection. There are those who, it might be said, occasionally rely on record titles as a basis for granting credit; the financial rating of the depositor would probably be affected by *secret* liens.

W. D. Rollison.

⁴⁸ See: 3 Pomeroy, Equity Jurisprudence (3d ed.) § 1266.